

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

JOSEPH HALEY,

Plaintiff,

V.

DAVE MILLER

DR. INOCENTES SATOR

LINDA CORBIN,

Defendants.

Civil Action No. 3:09-cv-00170

Judge Campbell/Brown

Jury Demand

To: The Honorable Todd J. Campbell, Chief District Judge

REPORT AND RECOMMENDATION

On February 19, 2009, the Court entered an Order (Docket Entry 4) referring this action to the Magistrate Judge “to enter a scheduling order for the management of the case, to dispose or recommend disposition of any pretrial motions under 28 U.S.C. §§ 636(b)(1)(A) and (B), and to conduct further proceedings, if necessary, under Rule 72(b), Fed. R. Civ. P., and the Local Rules of Court.”

Presently pending before the Court is the Motion to Dismiss (Docket Entry 102) filed on behalf of Defendant, Linda Corbin. The Magistrate Judge has carefully reviewed the Plaintiff's Response to the Motion to Dismiss along with accompanying memoranda from opposing parties (Docket Entries 102, 108-109). Accordingly, for the reasons stated below, the Magistrate Judge

respectfully recommends that the Defendant's motion should be denied.

The Federal Rules of Civil Procedure require that a defendant be served within 120 days after the filing of a complaint under Rule 4(m). Fed. R. Civ. P. 4(m). The court must dismiss the action without prejudice against a defendant who is not served within the allowed time. *Id.* However, if there is a good reason that the plaintiff has been unable to serve the defendant, the court must allow an appropriate extension of time in which service can be accomplished. *Id.*

Here, in an action pursuant to 42 U.S.C. §§ 1983, 1985, and 1986, the Plaintiff with leave of Court filed an amended complaint adding Linda Corbin as a defendant. (Docket Entry 65). The amended complaint was entered on December 29, 2009, and copies of documents related to the amendment were sent via certified mail to the Plaintiff the same day. (Docket Entries 64, 65, and 66). Due to administrative error, no summons was issued to the Defendant added in the amended complaint.

On May 14, 2010, the Defendant, Linda Corbin, filed a motion pursuant to Rule 12(b)(4) and 12(b)(5) of the Federal Rules of Civil Procedure requesting that the Plaintiff's cause of action against her be dismissed for failure to execute proper service. Because this Plaintiff is proceeding *in forma pauperis*, the Magistrate Judge has now ordered that the Clerk issue a summons to Defendant, Linda Corbin, to be executed by the United States Marshall Service. Due to the Court's administrative error in failing to issue a summons to the additional defendant after the amended complaint was entered, the undersigned believes an extension beyond the time restriction listed in Rule 4(m) is appropriate.

The Defendant in question is listed in the amended complaint as "the Acting Health Services Administrator overseeing the medical care of inmate[s] in the State of Tennessee and legally

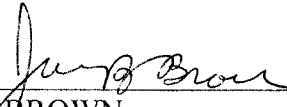
responsible for the operation of medical disbursement.” (Docket Entry 66). It is not clear at the present time if this Defendant is subject to qualified governmental immunity. The Defendant’s pending Motion to Dismiss is based solely on the lack of proper service. The Magistrate Judge will await further briefing from the parties regarding qualified immunity if applicable.

RECOMMENDATION

For the reasons discussed above, the undersigned respectfully RECOMMENDS that the Court DENY the Defendant’s Motion to Dismiss (Docket Entry 102).

Any party has fourteen (14) days from receipt of this Report and Recommendation in which to file any written objection to it with the District Court. Any party opposing said objections shall have fourteen (14) days from receipt of any objections filed in which to file any responses to said objections. Failure to file specific objections within fourteen (14) days of receipt of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. *Thomas v. Arn*, 474 U.S. 140 (1985); *Cowherd v. Million*, 380 F.3d 909, 912 (6th Cir. 2004) (en banc).

ENTERED this 15 day of June, 2010.



JOE B. BROWN
United States Magistrate Judge